LIBRARY
1162 SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 22 1970
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

PETITION for CERTIORARI

BY

DR. LOYD C. YEARGIN, Petitioner

vs.

HAMILTON MEMORIAL HOSPITAL, DALTON-WHITFIELD COUNTY HOSPITAL AUTHORITY, DR. ELI A. ROSEN, DR. NEIL D. BOGGESS, JR., DR. MARION VICTOR DARDIN, DR. ROYAL T. FARROW, DR. MURRAY B. LUMPKIN, DR. DAVID M. NOWELL, DR. JAMES J. OOSTERHOUNDT, DR. DRAYTON SANDERS, DR. SIDNEY L. SELLERS, DR. W. RONALD TIPTON, DR. DAVID A. WELLS, MR. JACK BANDY, MR. J. EDGAR BROOKER, MR. CARL GRIGGS, MR. DAVID HAMILTON, MR. J. EDD KING, MR. E. DEAN SMITH, and MR. JACK P. TURNER,

Appellees.

from

SUPREME COURT OF THE STATE OF GEORGIA

in Its Case No. 25,421.

H Garland Head III
Roswell, Ga

HUGH G. HEAD, JR.
1203 Healey Building
Atlanta, Georgia 30303
Attorney for Petitioner

TO THE SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C.

PETITION FOR CERTIORARI

This is a petition to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Georgia to submit for review and reversal here the opinion and decision of the Supreme Court of the State of Georgia entered November 6, 1969, in its Case Number 25,421, entitled DR. LOYD C. YEARGIN, APPELLANT, VERSUS HAMILTON MEMORIAL HOSPITAL, DALTON-WHITFIELD COUNTY HOSPITAL AUTHORITY, DR. ELI A. ROSEN, DR. NEIL D. BOGGESS, JR., DR. MARION VICTOR DARDIN, DR. ROYAL T. FARROW, DR. MURRAY B. LUMPKIN, DR. DAVID M. NOWELL, DR. JAMES J. OOSTERHOUNDT, DR. DRAYTON SANDERS, DR. SIDNEY L. SELLERS, DR. W. RONALD TIPTON, DR. DAVID A. WELLS, MR. JACK BANDY, MR. J. EDGAR BROOKER, MR. CARL GRIGGS, MR. DAVID HAMILTON, MR. J. EDD KING, MR. E. DEAN SMITH, and MR. JACK P. TURNER, APPELLEES.

The opinion of the Georgia Supreme Court is officially reported in 225 Georgia Supreme Court Reports page 661, 1969. It appears here as an appendix, in accordance with Rule 39.

The decision of the Supreme Court of the State of Georgia hereby appealed from was rendered November 6, 1969, denying Appellant YEARGIN's MOTION FOR REHEARING of the opinion entered October 1, 1969. That opinion affirmed the decision of the trial Court, the Superior Court of Whitfield County, Georgia.

Jurisdiction of this Court to review this cause is believed to exist in United States Code Title 28 Sections 1254 and 2103 and 1257 (State court review).

GROUNDS (Rule 23 1(b))

The grounds of this appeal by certiorari are that the Supreme Court of the State of Georgia erred, thereby depriving Appellant YEARGIN of his civil rights and denying him due process of law and the equal protection of the Constitution of the United States, all as set out in the appended appeal and record in the Georgia Supreme Court. Succinctly stated, the issues are these:

(1) HAMILTON MEMORIAL HOSPITAL, Dalton, Whitfield County, Georgia, and the public State-created Authority which operates that Hospital, denied Appellant YEARGIN the right to operate in or use the facilities of HAMILTON MEMORIAL HOSPITAL. Appellant YEARGIN is a duly licensed practicing medical physician who has been practicing medicine and surgery, duly licensed by the State of Georgia (under code sections and laws fully set out in the appended appeal record), to practice medicine and surgery in all its forms, since 1951.

(2) Appellant physician YEARGIN is competent, has an unblemished record of excellent performance, and no complaint appears against him, but because he insisted upon his lawful right to perform whatever surgical or other medical procedures he felt himself qualified to do in that public facility, HAMILTON MEMORIAL HOSPITAL (a Hill-Burton public tax-supported facility), Defendants and Appellees refused Apellant YEARGIN the entire use of the said public hospital facilities.

(3) Appellant contends that his civil rights afforded by the U. S. Constitution and the Acts of Congress, and also by the laws and statutes of the State of Georgia (all as detailed in the appended record here), have been violated. Appellant is denied by the decision of the Georgia Courts (trial and Supreme), his property rights as well as his civil rights.

(4) One question of prime and overriding public importance pervades this case, and that is, shall the right of the public, meaning the rights of patients, to select their own

physician and to use and have their physician use the public tax-supported hospital facilities in treating individual patients as their selected physician adjudges and decides they should be treated, shall that right be curtailed by the Appellants?

In short, when the statute laws in force without impairment in Georgia for nearly half a century specify that a licensed medical physician and surgeon may not be further examined but may practice medicine and surgery in all its branches, then do other physicians, hospitals, and courts have power, without violating the Constitution and laws, to exercise control so as to specify what such doctor can and what he cannot do?

Those are the questions in this case, and all the issues are covered by the pleadings, record and laws and decisions contained in this case's record, which will be filed if certiorari is granted.

Respectfully
(Hugh G. Head, Jr.)
HUGH G. HEAD, JR.,
Appellant's Attorney at Law
1203 Healey Building
Atlanta, Georgia 30303

H. Garland Head, III.

HUGH G. HEAD, JR.
Attorney at Law
1203 Healey Building
MUrray 8-3296
ATLANTA, GEORGIA 30303

January 13, 1970

ORDER OF RECORD AND
NOTICE OF CERTIORARI

Hon. Henry H. Cobb, Clerk of
The Supreme Court of Georgia,
Judicial Building,
Capitol Square South,
Atlanta, Georgia 30303

In re: DR. LOYD C. YEARGIN, Appellant vs. HAMILTON MEMORIAL HOSPITAL, DALTON-WHITFIELD COUNTY HOSPITAL AUTHORITY, et al., Supreme Court of Georgia Case No. 25421

Dear Mr. Cobb:

Confirming our earlier conversations, please take this as notice of appeal to the United States Supreme Court, Washington, D.C., by Dr. Loyd C. Yeargin from the order of the Georgia Supreme Court in Court's decision of November 6, 1969, denying Appellant's Motion for Rehearing in Case No. 25421, as above, this appeal to be by certiorari under Rule 23 and others.

Pursuant to Rule 12 of the Supreme Court Rules, Title 28, United States Code §2071 et seq., you are hereby respectfully requested to certify the record, the entire record in this case and to provide for its transmission to the Supreme Court of the United States, Washington, D.C.

This appeal by certiorari is taken pursuant to United States Code Title 28 Section 1257 (3), Appellant YEARGIN contends his civil rights have been violated, that he has been denied due process of law in violation of Amendment 14 of the U.S. Constitution, and that his property right to practice medicine and surgery has been denied him contrary to the U.S. Constitution. The question on which this case turns is whether a tax-supported Hill-Burton Hospital may deny a licensed Georgia physician and surgeon the right to its facilities.

Please prepare a transcript of the record in this cause for transmission to the U.S. Supreme Court, and include the entire record.

Respectfully,
(Hugh G. Head, Jr.)
Hugh G. Head, Jr.
Appellant's Attorney

HUGH G. HEAD, JR.
Attorney at Law
1203 Healey Building
MUrray 8-3296
ATLANTA, GEORGIA 30303

PROOF OF SERVICE

GEORGIA, FULTON COUNTY:

I, Hugh G. Head, Jr., Attorney for Appellant Dr. Loyd C. Yeargin in Case No. 25421 in the Supreme Court of the State of Georgia, against HAMILTON MEMORIAL HOSPITAL, and others, do hereby swear that on this day the 13th day of January, 1970, I served a copy of the foregoing Notice of Appeal by Certiorari to the Supreme Court of the United States on Hamilton Memorial Hospital, Appellee, and on all the other Appellees named in and parties to said action, by mailing a copy of the foregoing notice and request for the record to their Counsel of record, Hon. Trammell E. Vickery, Atlanta, Georgia,

and to Hon. H.E. Kinney and to Hon. John T. Minor, III, both of Dalton, Georgia, and by also delivering a copy to the law offices of Hon. Trammell E. Vickery, Haas-Howell Building, Atlanta, Georgia, Jan. 13, 1970:

(Hugh G. Head, Jr.)
Hugh G. Head, Jr.,
Appellant's Attorney

Sworn to and subscribed before me
this the 13 Jan. 1970:

[Signed] Mrs. Lewis M. Quigg
Notary Public, Georgia

APPENDIX

GEORGIA SUPREME COURT
FINAL DECISION

Nov. 6, 1969, with opinion Oct. 1, 1969

Supreme Court of Georgia Decided Oct. 1, 1969

25421. YEARGIN v. HAMILTON MEMORIAL HOSPITAL et al.

The court did not err in holding that the Hospital Authority was not required to grant a physician unlimited and unrestricted rights to serve as a member of the active staff of the hospital operated by the Authority and not required to allow him to use all of the privileges of active staff members according to the dictates of his own opinion and judgment. The Authority and hospital may restrict a staff member's privileges by reasonable and non-discriminatory rules and regulations.

Dr. Loyd C. Yeargin instituted an action in the Superior Court of Whitfield County against Hamilton Memorial Hospital, Dalton-Whitfield County Hospital Authority and various official members of the two above-named defendants and against each such individual, individually to recover damages and injunction for reasons stated in the petition. It is not necessary to set forth in detail the allegations since they become apparent from a discussion of the facts and discussion of them in the opinion. The same applies to the answers of the defendants. On an interlocutory hearing of the case the court, partially by agreement of the parties, rendered the following judgment: "The above case having come on to be heard pursuant to plaintiffs' prayers for temporary injunction and, after hearing evidence and arguments of counsel, it is ordered and adjudged that temporary restraining order issued herewith under date of May 16, 1969, be and the same is hereby vacated; it is further

ordered and adjudged that until further order of court the plaintiffs' prayers for temporary injunction be, and the same are hereby granted subject to the provisions hereof in the following particulars: (a) Defendant, Dalton-Whitfield County Hospital Authority, d/b/a Hamilton Memorial Hospital, its officers, agents, servants, employees, and all persons in active concert or participation with said defendant, are temporarily restrained and enjoined from denying the plaintiff, Dr. Loyd C. Yeargin, the right to admit patients to Hamilton Memorial Hospital; and are further restrained and enjoined from denying to plaintiff, Dr. Loyd C. Yeargin, the right to exercise with respect to any patients so admitted those medical staff privileges which were recommended for Dr. Yeargin by the Medical and Dental Staff of Hamilton Memorial Hospital in acting on the application of the said Dr. Loyd C. Yeargin for membership on the medical staff for the hospital's fiscal year 1968-1969. A copy of the privileges so recommended is attached hereto and made a part hereof. (b) Dr. Loyd C. Yeargin shall in connection with the exercise of medical staff privileges and in connection with the use of services or facilities of Hamilton Memorial Hospital abide by rules and regulations of the Dalton-Whitfield County Hospital Authority, d/b/a Hamilton Memorial Hospital, and rules and regulations of the Medical and Dental Staff of Hamilton Memorial Hospital which have been approved by defendant Authority; it is further ordered and adjudged that the remaining prayers of the plaintiff's application for temporary injunction be, and the same are hereby denied. Done and Ordered this 23rd day of May, 1969. [Signed] Robert L. Vining, Jr., Judge, Superior Court of Whitfield County, Conasauga Judicial Circuit." From this order the plaintiff appeals, enumerating the following errors: "1. The court erred in its order of May 23, 1969 (pages R25-29), in that: (1) It failed to restrain defendants from further interfering with plaintiff-appellant Yeargin's rights to the unrestricted practice in the hospital; and, (2) It restrained and limited plaintiff-appellant Yeargin's privileges as a physician and surgeon, contrary to law and to equity: and, (3) The court

acted upon the mistaken concept that it had power and defendants-appellees had power to restrict the professional judgment and physician's actions of plaintiff-appellant Yeargin, a duly licensed physician and surgeon."

Hugh G. Head, Jr., for Appellant.

Jones, Bird & Howell, Trammell E. Vickery, McCamy, Minor, Phillips & Tuggle, John T. Minor, III, Pittman & Kinney, H.E. Kinney, for Appellees.

FELTON, Justice. On September 20, 1968, the plaintiff applied for appointment to the active medical staff of the Hamilton Memorial Hospital of Dalton, Georgia, operated by the Dalton-Whitfield County Hospital Authority, a body corporate under the laws of Georgia. At the end of the application the following certification by the applicant was signed: "Certification by Applicant. 'As a part of this application for appointment, I further certify that I will abide by the by-laws, rules and regulations of the Dalton-Whitfield County Hospital Authority and the Medical Staff of Hamilton Memorial Hospital in effect at this time and as hereinafter amended. I further understand that this appointment, if granted, is for the period of one year only, or until the end of the fiscal year of Hamilton Memorial Hospital, whichever period occurs first. I understand that privileges granted me upon my initial appointment are provisional for a period of not less than one year.' This 12th day of June, 1968. [Signed] L. C. Yeargin, M.D." Attached to and forming a part of the application is a list of the privileges applicant requested. At the top of the page is the following statement: "All appointments and privileges granted become final upon approval by the Dalton-Whitfield County Hospital Authority. Procedures not specifically listed shall be categorized with procedures of similar magnitude on the decision of the chief of the department involved."

On December 30, 1968, Doctor Yeargin received the following letter from "Hamilton Memorial Hospital, By Norman

D. Burkett, Administrator": "Dear Doctor Yeargin: The governing body of Hamilton Memorial Hospital has approved your application for appointment to the Medical and Dental Staff of Hamilton Memorial Hospital for the fiscal year 1968-1969 and has accorded you those privileges which have been recommended by action of the Medical and Dental Staff and Joint Conference Committee and previously transmitted to you. Pursuant to the bylaws of the Medical and Dental Staff it is necessary that I secure your signature to the enclosed form evidencing your willingness to abide by the bylaws, rules and regulations of the Dalton-Whitfield County Hospital Authority and the Medical and Dental Staff of Hamilton Memorial Hospital. We respectfully call to your attention the requirement of the bylaws that the enclosed form be executed within one week." On January 6, 1969, Doctor Yeargin wrote the Hospital the following letter of acceptance of the appointment which was identical to the form sent to him by the Hospital Administrator, with the exception of the qualifying words in brackets in the Doctor's letter of acceptance: "[Except bylaws, rules and regulations, and action taken by the Medical staff and the Authority against the public interest, the laws of Georgia and the Constitution of the United States.]" Appellant continued to refuse to abide by the requirements of the hospital which resulted in his being denied all privileges.

In response to the above indicated response to the actions by the hospital authorities, Doctor Yeargin made no complaint that he had been approved for less categories than he requested or that the hospital had discriminated against him in denying him certain categories or denied him a hearing or right of appeal, or that the restricting rules were unreasonable. Neither did Doctor Yeargin request to be granted all categories, which seems inconsistent with his only contention in the case which is that he is entitled to a free hand in treating his patients in the hospital without any single restriction whatsoever. Because he was not granted this unqualified right he instituted this action. In his application he agreed to agree with the hospital's position, but we know of no rule which would prevent him

from changing his mind to his advantage. The contention of Doctor Yeargin is that there should be no restriction upon him by the State after a license is issued to him, not that the provisions by the various acts and authorized delegations of power are illegal.

Appellant plants his case upon Acts of the General Assembly codified in Ga. Code Ann. § 84-907 where it is provided that if an applicant for a medical license is found qualified by the State Board of Medical Examiners "he shall be eligible to receive a license . . . giving him *absolute authority* to practice medicine in this State." (Emphasis supplied). This contention has been repudiated by decisions of this court, the United States Supreme Court, and others.

It was stated in Hughes v. State Board of Examiners, 162 Ga. 246, 256 (134 SE 42): "With reference to the criticism directed against the Act that it would prevent a physician from the right to practice, though he might otherwise be qualified, and that it would deprive him of a valuable property right, it is said in 21 R. C. L. 352, II, 3, that 'The right to practice medicine is . . . a valuable property right, in which, under the Constitution and laws of the State, one is entitled to be protected and secure. On the other hand, the preservation of public health is one of the duties devolving on the State as the sovereign power, and the discharge of this duty is accomplished by means of the exercise of the inherent police power of the sovereign. Thus is presented a conflict between the right of a citizen to follow a profession, and the right of the State to protect the health and welfare of its citizens; but not a very serious conflict, because the outcome is always clear. Every citizen has the undoubted right to follow any lawful calling, business, or profession he may select, subject only to such restrictions as the government may impose for the welfare and safety of society. This right is one of the distinguishing features of republican institutions. Many of the occupations of life may be followed by persons, irrespective of fitness without danger to the public health, or any detriment to the general welfare;

others demand special knowledge, training, or experience; and the power of the State to prescribe such restrictions and regulations for those as, in its judgment, shall protect the people from the consequences of ignorance or incapacity, as well as deception and fraud, has never been questioned. This is especially true with respect to the practice of medicine. Nearly everyone, of necessity, consults the physician at some period of life, but few are able to judge his qualifications in point of learning and skill; and because of the importance of the interests committed to his care, involving health and life, it is perfectly clear that the State may interfere with the right of the individual and place restrictions and regulations on the practice of medicine. A statute regulating the right to practice medicine, but leaving the field open to all who possess the prescribed qualifications, does not abridge the privileges or immunities of citizens.' See Dent v. West Va., 129 U. S. 114 (9 SC, 231, 32 LE 623) and other cases cited." To the same effect see Hayman v. City of Galveston, 273 U. S. 414 (47 SC 363 71 LE 714; Hawker v. New York, 170 U. S. 189, 192 (18 SC 573, 42 LE 1002). In the case next above cited the court said: "In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the State board whose action is challenged is not a denial of the equal protection of the laws." For State decisions to the same effect, see 24 ALR 2d 850; 40 AmJur 2d 856, Hospitals and Asylums § 8.

The judgment rendered in this case is one which was suggested by the appellees as a gesture of unparalleled good will, fair play and cooperation. It was a literal "second mile" performance to insure the protection of the appellant and his patients until the final decision in the case. Whether this attitude will continue in view of our decision in this case is of course beyond our power to control, but we can at least hope that after the battle is over the spirit demonstrated above will pervade the peace conference. In saying this, the writer is speaking for himself alone.

Speaking for the court, the trial judge did not err in holding in accordance with the foregoing opinion.

Judgment affirmed. **All the Justices concur.**

SUPREME COURT OF GEORGIA

Atlanta, October 1, 1969

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Loyd C. Yeargin v. Hamilton Memorial Hospital et al.

This case came before this court upon an appeal from the Superior Court of Whitfield County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

BILL OF COSTS, $30.00

SUPREME COURT OF GEORGIA

Atlanta, November 6, 1969

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Loyd C. Yeargin v. Hamilton Memorial Hospital et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta,

January 15, 1970

I hereby certify that the foregoing pages consecutively numbered 1 through 16, hereto attached, contain a true and complete copy of the Georgia Supreme Court's opinion, judgment and order denying the motion for rehearing in Georgia Supreme Court Case No. 25,421, Yeargin v. Hamilton Memorial Hospital et al., as appears from the records and files of this office.

SEAL OF THE SUPREME COURT OF THE STATE OF GEORGIA

Witness my signature and the seal of the said Court hereto affixed the day and year above written.

[Signed] Henry H. Cobb

Clerk

ACKNOWLEDGMENT OF SERVICE

Service of the within and foregoing Petition for Certiorari by Dr. Loyd C. Yeargin versus Hamilton Memorial Hospital, et al., from Georgia Supreme Court case #25,421, to the United States Supreme Court, is hereby acknowledged, this 21 January, 1970.

Trammell E. Vickery,
As Attorney of Record for
Defendants

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 16 1970
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF
THE UNITED STATES

_____ TERM, 1970

NO. 1102

DR. LOYD C. YEARGIN, Petitioner

VS.

HAMILTON MEMORIAL HOSPITAL, DALTON-WHITFIELD COUNTY HOSPITAL AUTHORITY, DR. ELI A. ROSEN, DR. NEIL D. BOGGESS, JR., DR. MARION VICTOR DARDIN, DR. ROYAL T. FARROW, DR. MURRAY B. LUMPKIN, DR. DAVID M. NOWELL, DR. JAMES J. OOSTERHOUDT, DR. DRAYTON SANDERS, DR. SIDNEY L. SELLERS, DR. W. RONALD TIPTON, DR. DAVID A. WELLS, MR. JACK BANDY, MR. J. EDGAR BROOKER, MR. CARL GRIGGS, MR. DAVID HAMILTON, MR. J. EDD KING, MR. E. DEAN SMITH, and MR. JACK P. TURNER,

Respondents

ON PETITION FOR WRIT OF CERTIORARI

from the

SUPREME COURT OF THE STATE OF GEORGIA
IN ITS CASE NO. 25,421

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

LEMUEL HUGH KEMP
100 N. Selvidge Street
Dalton, Georgia 30720

JOHN T. MINOR, III
411 W. Crawford Street
Dalton, Georgia 30720

H. E. KINNEY
100 N. Selvidge Street
Dalton, Georgia 30720

TRAMMELL E. VICKERY
Haas-Howell Building
Atlanta, Georgia 30303

ATTORNEYS FOR RESPONDENTS

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion in question is that of YEARGIN v. HAMILTON MEMORIAL HOSPITAL, ET AL, 225 Ga. 661 (pp. 7-13, Appendix to Petition for Certiorari.)

JURISDICTION

Petitioner invokes jurisdiction of this court because jurisdiction is "believed to exist" under Title 28, United States Code, Sections 1254, 1257 and 2103 (Page 1 of Petition). Respondents deny that jurisdictional grounds exist under said provisions.

STATUTES INVOLVED

No federal or state statute is alleged to be unconstitutional.

QUESTIONS PRESENTED

Petitioner presents four alleged grounds or questions on pages 2 and 3 of the petition. However, the sole question involved is:

> WHETHER HOSPITAL AUTHORITIES IN GEORGIA HAVE THE POWER AND THE RIGHT TO PRESCRIBE REASONABLE RULES AND REGULATIONS GOVERNING APPOINTMENT OF PHYSICIANS TO THE MEDICAL STAFF OF AUTHORITY-OPERATED HOSPITALS, AS WELL AS THE SCOPE OF MEDICAL STAFF PRIVILEGES.

STATEMENT OF FACTS

The Petitioner instituted this case in the Superior Court of Whitfield County, Georgia against Respondents for an injunction and damages because of their uniform application of the rules, by-laws and regulations of the Hamilton Memorial Hospital to him. The Petitioner had contended that he had the **absolute** right to perform any surgical or other procedure in said Hospital and to operate pursuant to his own desires without reference to the rules, by-laws and regulations of the governing authorities of the Hospital which included his fellow physicians. Both the Trial Court and the Supreme Court of Georgia unanimously concluded that the right of the State to protect the health and welfare of its citizens through reasonable regulations of the medical and other professions and numerous court rul-

ings supporting such regulation required a rejection of petitioner's position. Additional details as to the rules and regulations involved are stated in the opinion of the Supreme Court of Georgia.

ARGUMENT AND LAW

Certiorari should be denied in this case because the opinion of the Supreme Court of the State of Georgia is not erroneous as Petitioner has not been denied due process of law, or equal protection of the laws under the Constitution of the United States. In fact these issues have also been decided against petitioner by the Federal Courts.[1] The sole question presented by this petition is whether a hospital has the power and right to prescribe reasonable rules and regulations governing appointment of physicians to the medical staff of Authority operated hospitals, as well as the scope of medical staff privileges. The Supreme Court of Georgia correctly answered this question in the affirmative and this decision should not be disturbed. Since Petitioner states the above single question in four separate numbered paragraphs, Respondents have numbered their answers to these assertions in the same manner.

(1) Hamilton Memorial Hospital, Dalton, Whitfield County, Georgia, and the public State-created Hospital Authority did not

1. "Petitioner originally filed suit against many of the same respondents in this action, and on the same facts presented here, in the United States District Court for the Northern District of Georgia (Civil Action No. 2085) alleging a deprivation by said respondents of petitioner's civil rights as well as a violation of the equal protection clause of the Constitution of the United States.

An order and opinion of the District Court filed April 14, 1969, denied relief and dismissed the action.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, but later filed a Motion to Dismiss the Appeal, which motion was granted by the Fifth Circuit.

The opinion and order of the District Court, Appellant's Motion to Dismiss his Appeal, and the order of the Fifth Circuit granting the same are reproduced in the appendix of this brief.

Petitioner should not be heard to complain in this Court of alleged deprivation of Federally protected rights which issues were decided adversely to him. The matter is *Res Judicata* by virtue of the ruling of the District Court and dismissal by Petitioner of the Appeal therefrom."

deny Petitioner Yeargin the right to operate in or use the facilities of Hamilton Memorial Hospital as asserted in applicant's petition, Paragraph No. 1 at page 2. The final decision of the Supreme Court of Georgia and the entire record shows that Dr. Yeargin was not denied the right to operate in or use the facilities of the Hospital, but on the contrary was *granted* certain privileges and categories of procedure in accordance with the reasonable rules, by-laws, and regulations, of the Medical and Dental Staff of Hamilton Memorial Hospital. (pp. 7-11—Appendix to Petition for Certiorari) *Yeargin* v. *Hamilton Memorial Hospital, et al* 225 Ga. 661.

Petitioner now claims he has the *unconditional* right to practice in the hospital. No such unconditional right exists. See *Hayman* v. *City of Galveston,* 273 U.S. 414 (1927), 71 L. Ed. 714, 47 S. C. 363 (Physicians may be excluded, if classifications not arbitrary or unreasonable on their face). *Stanturf* v. *Sipes,* 335 F. 2d 224 (8th Cir. 1964) (Patient's suit dismissal for lack of Federal jurisdiction) Moreover, as pointed out in the opinion of the Supreme Court of Georgia, (p. 10 last paragraph Appendix to Petition for Certiorari) Dr. Yeargin did not himself request to be granted all categories and all privileges:

> "Neither did Doctor Yeargin request to be granted all categories, which seems inconsistent with his *only* contention in the case which is that he is entitled to a free hand in treating his patients in the hospital without any single restriction whatsoever. Because he was not granted this unqualified right he instituted this action."

The general rule of law as to the managing authority of a Hospital having the power to adopt reasonable rules and regulations for the government and operation thereof is stated in 24 *ALR* 2d 850 at 855 as follows:

> "It is generally agreed that the managing authorities of a hospital, under the power to adopt reasonable rules and the regulations for the government and operation thereof, may, in the absence of any statutory restriction, prescribe the qualifications of physicians or surgeons for admission to practice therein. This rule has been held or declared applicable in the case of both public and private institu-

tions, as indicated in the following citations:

United States—Hayman v. City of Galveston (1927) 273 U.S. 414, 71 L Ed. 714, 47 S. C. 363 (public).

(Numerous State cases are then cited holding to the same effect)

(2) In paragraph (2) of Petitioner's grounds for certiorari, he alleges that the Hospital denied him the "entire use" of the public hospital facilities.[2] This is not a correct statement of the facts. The decision of the Georgia Supreme Court (Appendix, p. 8 of Appellant's Petition for Certiorari) shows that Petitioner was given medical staff privileges subject to the reasonable rules and regulations of the Hospital and the Hospital Authority. Dr. Yeargin desired the free hand to operate upon and treat his patients in the hospital without any single restriction whatever. Because he was not granted that right, he instituted the action.

(3) Petitioner contends in Ground (3) that his civil rights have been violated by the trial and State court. The order of the trial judge clearly shows Petitioner was granted those medical staff privileges recommended by the medical and dental staff of the Hospital. The trial judge gave him the right of practice subject to his abiding by the rules and regulations of the Hospital, the Hospital Authority, and the Medical and Dental Staff (p. 7 and 8 Appendix to Petition for Certiorari).

This is not a case involving alleged racial discrimination and this contention is not in issue in this case. There is nothing in the record to indicate that persons similarly situated have been treated differently from Petitioner. No factual basis for invidious discrimination is alleged. There is no allegation or proof that the same rules and regulations were not applied to all other doctors on the Hospital staff. There is no allegation of the violation of any of the Civil Rights Acts.

In its decision in this case the Georgia Supreme Court held that the statute regulating the right to practice medicine, does not

2. Petitioner's claims as to deprivation of civil rights has been finally decided adversely to him by a Federal Court sitting in Georgia. See opinions of District Court for the Northern District of Georgia in Civil Action No. 2085 attached as an appendix to this Brief. See footnote 1 of this Brief.

abridge the privileges and immunities of citizens, nor was it a denial of the equal protection of the laws. Federal and State cases are cited in support of this holding. (Appendix, p. 12 of Petition for Certiorari) (Opinion of Supreme Court of Georgia)

The excellent annotation appearing in 24 A.L.R. 2d 850, discusses the cases which have drawn a distinction between a physician's rights in "public" as distinguished from "private" hospitals.

In the case of "private" institutions, the general rule derived from the case is stated to be:

> "In the case of private hospitals, it is generally held that the exclusion of a physician or surgeon from practicing therein is a matter which rests in the discretion of the managing authorities."

On the other hand, as regards "public" institutions, the rule derived from the cases is:

> ". . . the rule is that a regularly licensed physician or surgeon has a right to practice in the public hospitals of the state so long as he stays within the law, and *conforms to all reasonable rules and regulations of the institutions.*" (emphasis supplied)

State decisions with similar holdings are legion. The cases espousing controlling principles are collected in the foregoing annotation, 24 A.L.R. 2d 850, wherein the general rule is stated as follows:

> "It has been stated that a physician or surgeon although duly licensed under general laws, has no constitutional or statutory right per se, to practice his profession in a public hospital. And it is generally recognized that a practitioner cannot complain of his exclusion from a public hospital by the operation of reasonable rules and regulations adopted for the government thereof."

The most cited and better reasoned cases include: *Hamilton County Hospital v. Andrews* (1949) 227 Ind. 217, 84 N.E. 2d 469, Reh. den., 227 Ind. 228, 85 N.E. 2d 365, cert den. 338 U.S. 831, 94 L. Ed. 506, 70 S. Ct. 73; *Green v. St. Petersburg* (1944) 154 Fla. 339, 17 So. 2d 517 (public); *Selden v. Sterling* (1942)

316 Ill. App. 455, 45 N.E. 2d 329 (public); and *Van Campen v. Olean General Hospital* (1924) 210 App. Div. 204, 205 N.Y.S. 554 aff'd without op 239 N.Y. 615, 147 N.E. 219 (involving private hospital, but rule declared applicable in case of public hospital also).

(4) Petitioner asserts he should have *absolute authority* to practice medicine in Georgia without any single restriction whatsoever. Such is and could not be the law! It is clear as a matter of common sense and from the authorities cited herein that a state may and *must* place reasonable regulations and restrictions on the practice of medicine.

Respondents wish to strongly emphasize to the Court that their position in this case is identical whether Hamilton Memorial Hospital is regarded as "private" or "public." No contention is made that the Governing Body, The Dalton-Whitfield County Hospital Authority, has or should have the right to act unreasonably or arbitrarily. What is involved here is rather whether petitioner, a licensed physician may successfully assert an *absolute* right to practice at Hamilton Memorial Hospital, and in so doing determine in his sole discretion the privileges which he is entitled to exercise in the hospital. The Courts on this function have spoken with unanimity.

In *Hayman v. City of Galveston*, 273 U.S. 414, 71 L. Ed. 714, (1927) the Supreme Court of the United States, speaking through Mr. Justice Stone said:

> *"In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws."*

The Supreme Court of Georgia has followed the rulings of this Court and therefore Certiorari should be denied.

CONCLUSION

Respondents respectfully submit that the petition for a Writ of Certiorari should be denied because it fails to set forth any

jurisdictional grounds therefor and fails to state any meritorious grounds therefor.

LEMUEL HUGH KEMP
100 N. Selvidge Street
Dalton, Georgia 30720

H. E. KINNEY
100 N. Selvidge Street
Dalton, Georgia 30720

JOHN T. MINOR, III
411 W. Crawford Street
Dalton, Georgia 30720

TRAMMELL E. VICKERY
Haas-Howell Building
Atlanta, Georgia 30303

ATTORNEYS FOR RESPONDENTS

ACKNOWLEDGMENT OF SERVICE

Service of the within and foregoing Brief for Respondents in Opposition to Petition for Certiorari by Dr. Loyd C. Yeargin v. Hamilton Memorial Hospital, et al from Georgia Supreme Court Case No. 25,421 to the United States Supreme Court, is hereby acknowledged.

This 12th day of February, 1970.

/s/ Hugh G. Head, Jr.
HUGH G. HEAD, JR.
AS ATTORNEY OF RECORD
FOR PETITIONER IN CERTIORARI

APPENDIX

OPINION OF
U. S. DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

CIVIL ACTION 2085

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

DR. LOYD C. YEARGIN MRS. WANDA TURNER vs. HAMILTON MEMORIAL HOSPITAL	CIVIL ACTION NUMBER 2085

This is an action under the Civil Rights statutes (42 U.S.C. §1981 ff.) by a physician suspended from the staff of the Hamilton Memorial Hospital and one of his obstetrical patients due for delivery shortly. Both plaintiffs seek injunctive relief making immediately available the facilities of the hospital and the physician plaintiff likewise seeks damages. In an order dated March 10, 1969, the Court raised certain jurisdictional issues and set the case down for a hearing on these issues. A temporary restraining order was issued on March 10 and the parties agreed to extend this injunction until the jurisdictional issues were decided. A hearing was held on March 27, 1969, on these jurisdictional issues.

There is no diversity jurisdiction present and this action must rise or fall on its standing under the Civil Rights statutes invoked. As has been pointed out by this court previously (Grant v. Grizzell, Civil Action No. 11316, Atlanta Division), each of such actions has a dual character in that, over and beyond the factual questions of intent and conspiracy, (1) the offending persons must act "under color of state law" and (2) there must be a denial of a right, privilege or immunity secured by the United States Constitution and laws. See United States v. Classic, 313 U. S. 299 (1941). e.g., Huey v. Barloga, 277 F. Supp. 864 (N.D. Illinois 1967).

Petitioner alleges that the defendant is a so-called "Hill-Burton" hospital, created and maintained by federal, state and local funds. As to requirement (1), it appears that such public status is sufficient to constitute any actions by the defendants as done "under color of state law." Simkins v. Moses H. Cone Hospital, 323 F. 2d 959 (4th Cir. 1963); Eaton v. Grubbs, 329 F. 2d 710 (4th Cir. 1964); Cypress v. Newport News General & Nonsectarian Hospital Ass'n., 375 F. 2d 648 (4th Cir. 1967). Sams v. Ohio Valley General Hospital Ass'n., 257 F. Supp. 369 (N.D. W. Va. 1955). Cf. Wallach v. Cannon, 357 F. 2d 557 (8th Cir. 1966) absence of state authorization); Rogers v. Provident Hospital, 241 F. Supp. 633 (N.D. Ill. 1965) (Private hospital). Accordingly, the court is satisfied as to jurisdiction of the parties on that basis.

As to requirement (2), however, not every right is a constitutional right within the meaning of these statutes. It must be clear that a federally recognized right is involved. See, e.g., Collins v. Hardyman, 341 U. S. 651 (1951); Fleming v. Adams, 377 F. 2d 975 (10th Cir. 1967); Nicklaus v. Simmons, 196 F. Supp. 691 (D. Neb. 1961). A clear case is presented where the right denied is specifically enumerated in the United States Constitution, e.g., first amendment freedoms, right to be free from unreasonable searches and seizures, etc. or "race, creed or color." This Court enumerated a number of these rights, a violation of which clearly presents a federally cognizable right, in Grant v. Grizzell, *supra.* The troublesome cases are those in which the only possible "federally recognized claim" is a violation of due process or equal protection of some state-controlled right. In the previous order the Court indicated that plaintiffs were proceeding under an equal protection argument and had not attempted to raise questions of due process. Plaintiffs' amendments to the complaint and the oral hearing only reinforce this conclusion. Plaintiff Yeargin claims a denial of the equal protection clause in defendant's depriving him "of his right to exercise his State-of-Georgia given license and privilege to practice medicine and surgery" in this hospital, and plaintiff Turner "of her right to receive the hospital services and patient care there" by the doctor of her choice.

The equal protection provision of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Some would argue that the equal protection clause as incorporated in the various Civil Rights statutes gives a cause of action in federal court only when equal pro-

tection of *federal* rights is involved. This proposition is sustainable but easily lends itself to a serious misunderstanding as to the nature of equal protection. For example, in Swank v. Patterson, 139 F. 2d 145 (9th Cir. 1944), the Court held that the right to practice medicine and surgery existed, if at all, by virtue of Arizona law but was not secured by the Constitution or laws of the United States. While it is true that the basic right is created by state law, another theory is that the equal protection clause still affords all citizens the right to be free from invidious discrimination under the law. Hence, a state in dealing with its domestic concerns has a broad power to classify citizens in the exercise of its police power and this power is limited only by constitutional rights and the doctrine that a classification may not be palpably arbitrary. Phillips Chemical Co. v. Dumas Independent School Dist., 361 U. S. 376 (1960). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Optical Co., 348 U. S. 483 at 489 (1954). This principle is sufficient to dispose of the jurisdictional issues in this case. As both plaintiffs are white, racial discrimination, which is per se invidious, is not a factor. Plaintiffs allege no factual basis for claiming invidious discrimination. There are no allegations that persons similarly situated have been treated differently from plaintiffs. See Hackin v. Lockwood, 361 F. 2d 499 (9th Cir.), cert. denied, 385 U. S. 960 (1966). The petition is phrased in terms of the unconditional right of a doctor to practice in a hospital and the unconditional right of a patient to have the doctor of her choice give treatment in the hospital of her choice. No such unconditional rights exist. See, (e.g., Hayman v. City of Galveston, 273 U. S. 414 (1927) (physicians may be excluded if classifications not arbitrary or unreasonable on its face); Stanturf v. Sipes, 335 F. 2d 224 (8th Cir. 1964) (patient's suit dismissed for lack of federal jurisdiction.) Accordingly, the attempt to vindicate the rights asserted is a matter that must be resolved in the state courts.[1] Plaintiff's action is there-

[1]The failure of the facts to support allegations cognizable in federal court has resulted in a rather narrow holding by this Court. However, the broader implications of this general problem are so important as to merit further discussion.

The coming of age of the Fourteenth Amendment has brought with it a number of unsettling possibilities as attorneys use their imagination to evolve more and more approaches that could expand avenues of relief in federal court. This expansion jeopardizes the place of the federal courts as courts of limited jurisdiction. A substantial effort needs to be made

to explore and articulate the limitations upon the expansion. The tests of "invidious discrimination" and "arbitrary and unreasonable classification" are somewhat vague and difficult to administer. Reduction of cases in this area can in part be accomplished by strictness in pleadings, in the sense that the plaintiff must state facts which arguably involve a constitutional violation. Moreover, the jurisdictional amount requirement in many cases can be of help. Some courts have suggested that the vindication of a private property or monetary right of any kind is not within the purview of 42 U.S.C. §1931, et seq. See, *e.g.*, Bradford Audio Corp. v. Pious, 392 F. 2d 67 (2d Cir. 1968); Gray v. Morgan, 371 F. 2d 173 (7th Cir. 1966), *cert. den.* 386 U. S. 1033 (1967); Hopkins v. Wasson, 227 F. Supp. 278 (E. D. Tenn. 1962), *aff'd.* 329 F. 2d 67 (1964); *Note, The "Property Rights" Exception to Civil Rights Jurisdiction—Confusion Compounded,* 43 N. Y. U. L. Rev. 1208 (1968). The Fifth Circuit has apparently not followed this view. See, *e.g.*, Parks v. Ivan Allen, Civil Action No. 25596 (5th Cir., March 27, 1969); Massell v. Saunders, 372 F. 2d 573 (5th Cir. 1967) (loss of garbage business); Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964) (liquor license case). Questions still remain as to the type of deprivations which are protected under the equal protection and due process clauses. In any type of state action, there will be some disparity as between the treatment of different citizens. In time these differences may well become the subject matter of suits in the federal courts. For example the *Hornsby* decision opened the doors to huge amounts of litigation. Further attention needs to be given to this difficult and uncertain area of the law, and some delineation made of the proper scope of federal jurisdiction in this regard.

fore dismissed. In order to allow the patients of Dr. Yeargin to make other hospital arrangements, the effect of this dismissal is made prospective and, by agreement, will remain in effect for thirty (30) days from the date of this order.

IT IS SO ORDERED.

This the 11th day of April, 1969.

Sidney O. Smith, Jr.
United States District Judge

FILED IN CLERK'S OFFICE
AND A TRUE COPY CERTIFIED, THIS
APRIL 14, 1969

Claude L. Goza, Clerk

By: Sadye J. Langston

Deputy Clerk

UNITED STATES
COURT OF APPEALS
FIFTH CIRCUIT
No. 27,978

DR. LOYD C. YEARGIN and MRS. WANDA TURNER,

Plaintiffs-Appellants

versus

HAMILTON MEMORIAL HOSPITAL, *et al,*

Defendants-Appellees

APPELLANTS' MOTION TO DISMISS

Come now the Appellants and, with leave of this Court, respectfully dismisses and withdraws this Appeal.

Respectfully,

Hugh G. Head, Jr.,
Attorney for Appellants

Copies of the foregoing Motion to Withdraw Appeal have been served on all Appellees by posting in the United States Mail with proper postage affixed to John T. Minor, III, Esquire, and to Trammell E. Vickery, Esquire, and to Attorneys Pittman & Kinney this the 9th day of October 1969.

Hugh G. Head, Jr.
Appellants' Counsel

ORDER OF DISMISSAL

By FIFTH CIRCUIT COURT OF APPEALS

Mr. Claude L. Goza, Clerk
U. S. District Court
P. O. Box 1186
Rome, Ga. 30161

Dear Mr. Goza:

No. 27978—Dr. Loyd C. Yeargin and Mrs. Wanda Turner v. Hamilton Memorial Hospital, et al (D. C. No. CA 2085)

Enclosed is a certified copy of an order this day entered by the Court dismissing the referenced appeal, which is issued as and for the mandate.

Returned herewith are the record on appeal and exhibits in this case. Please acknowledge receipt on enclosed copy of this letter.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By Audrey D. Glynn
Deputy Clerk

/adg
Encls.
cc & enc. to:
Mr. Hugh G. Head, Jr.
Mr. John T. Minor, III
Mr. Trammell S. Vickery

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27978

DR. LOYD C. YEARGIN and
MRS. WANDA TURNER,

Plaintiffs-Appellants,

versus

HAMILTON MEMORIAL HOSPITAL,
ET AL,

Defendants-Appellees.

— — — — —

Appeal from the United States District Court for the
Northern District of Georgia

— — — — —

Before THORNBERRY, MORGAN and CARSWELL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the appellants' motion to dismiss the appeal in the above entitled and numbered cause is hereby Granted.

U. S. COURT OF APPEALS

FILED

NOV. 10, 1969

EDWARD W. WADSWORTH
CLERK